A. The Agencies Misapprehend the Nature and Relative Weight of the Factors They Must Consider Under EPCA and EISA

In enacting EPCA in 1975, shortly after the energy crisis of 1973, Congress observed that "[t]e fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply retarding our economic growth and necessitating an alteration in our life's habitats and expectations."7 Among the goals of EPCA are to "'decrease dependence on foreign imports, enhance national security [and to] achieve the efficient utilization of scarce resources . . .'"8 The fundamental purpose of EPCA, however, is energy conservation.9 [EPA-HQ-OAR-2010-0799-9479-A1, p. 3]

In furtherance of the overarching goal of energy conservation, NHTSA must set fuel economy standards at "the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year." 10 The statute provides that "[w]hen deciding maximum feasible average fuel economy under this section, the Secretary . . . shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need for the United States to conserve cannot balance them in a manner that is contrary to fuel conservation: NHTSA "cannot set fuel economy standards that are contrary to Congress' purpose in enacting the EPCA – energy conservation."12 Further, NHTSA cannot give so much weight to any factor, including consumer choice or demand, that the goal of fuel conservation is undercut: "NHTSA may consider consumer demand, but 'it would clearly be impermissible for NHTSA to rely on consumer demand to such an extent that it ignored the overarching goal of fuel conservation.'"13 The Agencies also cannot act arbitrarily or capriciously; cannot advance conclusions unsupported by the evidence; if they conduct cost-benefit analyses, they may not assign values of zero to benefits that can be ascertained within a range; and they cannot bias their cost-benefit analysis. [EPA-HQ-OAR-2010-0799-9479-A1, pp. 3-4]

I. The Agencies must Complete an Endangered Species Act Section 7 Consultation to Ensure that their Action will not Jeopardize or Adversely Modify the Critical Habitat of any Species Listed as "Threatened" or "Endangered"

To our knowledge the Agencies have not initiated consultation with the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration Fisheries Service under Section 7 of the federal Endangered Species Act to ensure that this action will not jeopardize or adversely modify the critical habitat of any species listed as "threatened" or "endangered." [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

Congress enacted the Endangered Species Act ("ESA") to conserve endangered and threatened species and the ecosystems upon which they depend.111 The Supreme Court's review of the ESA's "language, history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities."112 As the Court found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."113 Species are added to the lists of endangered and threatened species by the U.S. Fish and Wildlife Service (with jurisdiction over most terrestrial and freshwater species) and the National Marine Fisheries Service (with jurisdiction over most

marine species) (collectively, the "Services"). A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 114 A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."115 Once a species is listed under the ESA, Section 7 requires all federal agencies to "insure" that their actions neither "jeopardize the continued existence" of any listed species nor "result in the destruction or adverse modification" of its "critical habitat."116 In addition, the "take" of listed species is generally prohibited.117 "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."118 The Services may, however, permit "incidental" take on a case-by-case basis if it finds, among other things, that such take will be minimized and mitigated and that such take will not "appreciably reduce the likelihood of survival and recovery of the species."119 [EPA-HQ-OAR-2010-0799-9479-A1, pp. 25-26]

Section 7 consultation is required for "any action [that] may affect listed species or critical habitat."120 Agency "action" is defined in the ESA's implementing regulations to include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."121 This regulatory definition of "action" clearly encompasses the Agencies' rulemaking, since the emissions from the regulated vehicles unquestionably will cause "modification to the land, water, or air." The U.S. Fish and Wildlife Service's and National Marine Fisheries Service's Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act (March 1998,) explains the above terms and definitions. There can also be no question that the enormous volume of direct, indirect, and cumulative emissions from the regulated vehicles "may affect" listed species, and therefore the Agencies must consult. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

The rulemaking will impact species listed as threatened and endangered in several ways, yet the Agencies have failed to initiate the required Section 7 consultations with the Services on its impact. If the Agencies fail to initiate and complete the required Section 7 consultations on the rulemaking, they may be held liable for take of listed species caused by the impacts of their action, including increased greenhouse gas emissions and other emissions such as NO_x. On May 15, 2008, the U.S. Fish and Wildlife Service listed the polar bear as a threatened species throughout is range due to global warming. 122 The Agencies must consult on the impact of the rulemaking on the polar bear. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

On May 9, 2006, the National Marine Fisheries Service listed the staghorn and elkhorn corals as threatened due in part to increasing ocean temperature and ocean acidification due to anthropogenic greenhouse emissions. 123 The Agencies must consult on the impact of the rulemaking on these coral species. The Agencies must also consult on the impact of the rulemaking on the polar bear's and the corals' critical habitat, once such habitat is designated. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

Global warming was cited by the U.S. Fish and Wildlife Service in its critical habitat rulemakings for the Quino Checkerspot and Bay Checkerspot butterflies.124 The Agencies must consult on the impact of the rulemaking on these species and their critical habitat as well. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

The Agencies must not limit their consultation, however, to species like the polar bear, corals, and checkerspot butterflies for which anthropogenic greenhouse emissions were cited as a reason for listing or as an impact in the listing or critical habitat rules. Numerous species are affected by climate change as reflected in the recovery plans for those species and other documents. [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

There at least 124 listed species for which a recovery plan has been adopted that specifically identifies climate change or a projected impact of climate change as a direct or indirect threat to the species, as a critical impact to be mitigated, as a critical issue to be monitored, and/or as a component of the recovery criteria.125 These findings constitute clear evidence that the Agencies' rulemaking "may affect" these species, and that they must consult on the impact of this action on all listed species which may be affected. [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

The rulemaking will impact listed species in ways beyond global warming and ocean acidification. For example, vehicles are a primary source of excess nitrogen in the environment. Excess nitrogen contributes to major environmental problems including reduced water quality, eutrophication of estuaries, nitrate-induced toxic effects on freshwater biota, changes in plant community composition, disruptions in nutrient cycling, and increased emissions from soil of nitrogenous greenhouse gases.126 Nitrogen deposition therefore impacts species listed under the Endangered Species Act in a number of ways. [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

The direct, indirect, and cumulative impacts of setting fuel economy standards for all passenger vehicles and light trucks nationally are extraordinarily significant, and therefore a large number of species may be implicated. Where, as here, the Agencies' rulemaking is national in scope, they should conduct a nationally focused consultation. The agencies must not attempt to use the large scale of the rulemaking as an excuse for ignoring its environmental review duties; instead, the scope of the action only makes it more important to thoroughly review its impacts under all applicable laws. Nor can the mere fact that a large geographical area or large number of species will be affected be used as an excuse for inaction.127 If anything, a nationally focused consultation will provide the opportunity to most efficiently analyze the impact of the rulemaking on species and groups of species. [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

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7 H.R. Rep. No. 94-340 at 1-3 (1975), as reprinted in 1975 U.S.C.C.A.N. 1762, 1763. [EPA-HQ-OAR-2010-0799-9479-A1, p. 3]

8 Center for Biological Diversity v. NHTSA, 538 F.3d 1172, 1182 (9th Cir. 2008) ("CBD v. NHTSA") (quoting S.Rep. No. 94-516 (1975) (Conf. Rep.), as reprinted in 1975 U.S.C.C.A.N. 1956, 1957). [EPA-HQ-OAR-2010-0799-9479-A1, p. 3]

9 Id. at 1195. [EPA-HQ-OAR-2010-0799-9479-A1, p. 3]

10 49 U.S.C. § 32902(a)(emphasis added). [EPA-HQ-OAR-2010-0799-9479-A1, p. 3]

11 Id. § 32902(f). [EPA-HQ-OAR-2010-0799-9479-A1, p. 4]

12 CBD v. NHTSA, 538 F.3d at 1197. [EPA-HQ-OAR-2010-0799-9479-A1, p. 4]

13 Id. at 1195 (quoting Center for Auto Safety v. NHTSA, 793 F.2d 1322, 1338 (D.C. Cir. 1986). [EPA-HQ-OAR-2010-0799-9479-A1, p. 4]

111 16 U.S.C. § 1531(b). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

112 Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

113 Id. at 184. [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

114 16 U.S.C. § 1532(6). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

115 16 U.S.C. § 1532(20). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

116 Id. at § 1536(a)(2). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

117 Id. at § 1538(a); 50 C.F.R. § 17.31(a). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

118 16 U.S.C. § 1532(19). [EPA-HQ-OAR-2010-0799-9479-A1, p. 25]

119 Id. at § 1539(a). [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

120 50 C.F.R. § 402.14. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

121 50 C.F.R. § 402.02. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

122 Endangered and Threatened Wildlife and Plants, Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout its Range, 73 Fed. Reg. 28212-28303 (May 15, 2008). [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

123 71 Fed. Reg. 26852 [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

124 See 73 Fed. Reg. 3328-3373 and 72 Fed. Reg. 48178-48218. [EPA-HQ-OAR-2010-0799-9479-A1, p. 26]

125 Anthony Povilitis and Kieran Suckling, Addressing Climate Change Threats to Endangered Species in U.S. Recovery Plans, Conservation Biology, Vol. 24, No 2, 372-376 (2010). [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

126 Fenn M.E. et al., Ecological Effect of Nitrogen Deposition in the Western United States, Bioscience 53:404 (2003), available at www.fs.fed.us/psw/publications/fenn/psw_2003_fenn012.pdf. [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

127 See, e.g., Wash. Toxics Coalition v. EPA, 413 F.3d 1024 (9th Cir. Wash. 2005) (upholding order requiring the EPA to consult on the impact of 54 pesticide ingredients on 25 species of fish.). [EPA-HQ-OAR-2010-0799-9479-A1, p. 27]

Response:

Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the National Oceanic and Atmospheric Administration Fisheries Service (NOAA Fisheries) and/or the U.S. Fish and Wildlife Service (FWS, and, with NOAA Fisheries, the Services), to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of federally-listed threatened or endangered species, or result in the destruction or adverse modification of designated critical habitat of such species. 16 U.S.C. § 1536(a)(2). Under the Services' relevant implementing regulations, consultation is required for actions that "may affect" listed species or designated critical habitat. 50 CFR § 402.14. Consultation is not required where the action has "no effect" on such listed species or critical habitat. Under this standard, it is the federal agency taking the action that evaluates the action and determines whether consultation is required. See 51 FR 19926, 19949 (June 3, 1986). The effects of a federal action are defined by regulation to include both the direct and indirect effects of the action on listed species or designated critical habitat. 50 CFR § 402.02. Indirect effects are those that are caused by the action and are later in time, but still are reasonably certain to occur. *Id.*; *Cf.*, 51 FR at 19932-19933 (discussing "reasonably certain to occur" in the context of cumulative effects analysis and noting that only matters that are likely to occur – and not speculative matters – are included within the standard).

Pursuant to Section 7(a)(2) of the ESA, EPA has carefully considered the effects of its MYs 2017-2025 light duty motor vehicle rule and has reviewed applicable ESA regulations, case law, and guidance to determine what, if any, impact there may be to listed species or designated critical habitat. EPA has considered issues relating to emissions of carbon dioxide (CO_2) and other greenhouse gases (GHGs) as well as issues relating to emissions of non-GHG air pollutants. EPA has also coordinated with NHTSA to assess ESA requirements in connection with EPA's rulemaking and NHTSA's related CAFE Standards. EPA notes that NHTSA's response to the ESA comment submitted on the NPRM is found in Chapter 9 (pages 9-99 through 9-102) of its Final EIS. EPA agrees with the reasoning in NHTSA's response as applied to EPA's rulemaking. Based on EPA's assessment, EPA has determined that the agency's rulemaking action, which will generally result in emissions reductions from what would otherwise occur in the absence of this rule, does not require consultation with the Services under Section 7(a)(2) of the ESA.

EPA notes that similar issues regarding applicability of ESA Section 7(a)(2) consultation requirements were raised by the same commenter in connection with EPA's MY 2012-2016 light duty motor vehicle rulemaking. In that context, EPA addressed in detail issues regarding ESA Section 7(a)(2) in its Response To Comment document at pages 4-94 through 4-103 (the MY

2012-2016 ESA Response). EPA believes that the same basic rationale as set forth in that response also applies to the current comment and rulemaking, and EPA adopts and incorporates that prior response here.

In particular, EPA notes that its rulemaking will result in GHG emissions reductions that would be expected to have beneficial effects with respect to global climate change and associated impacts. The commenter appears to generally misunderstand the effect of the rule and to attribute the entire volume of emissions from the regulated sector to EPA's action. To the contrary, the rule will generally reduce the impacts of climate change and will, therefore, be expected to have a beneficial effect with respect to global climate change. EPA believes, however, that any potential for a specific impact to particular listed species and their habitats associated with the emission changes achieved by this rulemaking is too uncertain and remote to trigger the threshold for ESA Section 7(a)(2) consultation.

As detailed in the MY 2012-2016 ESA Response, EPA's conclusion that ESA Section 7(a)(2) consultation is not required relies on the significant legal and technical analysis undertaken by FWS, the Department of the Interior (DOI), and EPA regarding GHG emissions and the ESA. As explained in that response, FWS and DOI have – in the context of various documents relating to the listing of the polar bear as a threatened species – determined that it is not possible, for ESA purposes, to trace a causal link between a single stationary source's GHG emissions and any reasonably certain effect on a specific species in a specific habitat.[93] Although EPA's rule involves GHG reductions from mobile sources rather than emissions from a single stationary source, EPA believes that the analysis regarding causation is relevant here. EPA agrees that there must be a causal connection between a federal action and a potential effect on listed species or critical habitat for Section 7(a)(2) consultation requirements to apply, and that the potential effect must be reasonably certain to occur.

In addition, as EPA did in the MY 2012-2016 ESA Response, EPA has also considered the specific GHG emissions reductions achieved by the current rule in light of any potential impacts on listed species or designated critical habitat. In the MY 2012-2016 ESA Response, EPA explained that it had previously attempted to analyze the impacts on temperature and tropical ocean pH of GHG emissions from a single large stationary source. In that prior analysis, EPA concluded that any such potential effects were too remote to trigger ESA Section 7(a)(2) consultation requirements. In the MY 2012-2016 ESA Response, EPA extended that analysis to the magnitude of GHG emission changes resulting from implementation of that rule and for similar reasons concluded that ESA consultation was not required. EPA has also considered the magnitude of GHG emission changes achieved by the current rule and finds that for the same reasons described in the MY 2012-2016 ESA Response, any potential effects attributable to such

[93] One of the principal relevant documents from the polar bear listing is FWS' Final Special Rule for the Polar Bear (73 FR 76249 (Dec. 16, 2008)). EPA is aware that the Federal District Court for the District of Columbia has found that the Final Special Rule did not comply with requirements of the National Environmental Policy Act (NEPA). See *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, 818 F. Supp.2d 214 (D.D.C. 2011). Importantly, however, the District Court did uphold FWS' approach regarding ESA Section 7(a)(2), which supports the relevant analytical framework addressed in EPA's MY 2012-2016 ESA Response and adopted as part of the current response set forth here.

changes are too remote to trigger ESA consultation. In particular, the EPA technical analysis for MY 2017-2025 concludes that, relative to the reference case, by 2100 projected atmospheric CO_2 concentrations are estimated to be reduced by 3.21 to 3.58 part per million by volume (ppmv), global mean temperature is estimated to be reduced by 0.0074 to 0.0176°C, and sea-level rise is projected to be reduced by approximately 0.071-0.159 cm, based on a range of climate sensitivities. The analysis also demonstrates that ocean pH will increase by 0.0017 pH units by 2100 relative to the reference case (ie, reduced acidification). As noted above, EPA believes that these results fit within the analytical framework of EPA's prior ESA/GHG assessments as described in the MY 2012-2016 ESA Response.

In the MY 2012-2016 ESA Response, EPA also considered non-GHG air pollutant emissions and concluded – for similar reasons as explained in relation to GHG emission changes – that the changes in emissions of such pollutants attributable to that rule did not trigger ESA Section 7(a)(2) consultation. EPA has also considered changes in non-GHG pollutant emissions associated with the current rulemaking. The following chart provides EPA's estimated changes for each of the non-GHG pollutants.

Annual Non-GHG Pollutant Emission Impacts of Program (short tons)

	CY 2020		CY 2030	
Pollutant	Impacts (Short Tons)	% of Total US Inventory	Impacts (Short Tons)	% of Total US Inventory
VOC	-11,712	-0.1%	-123,070	-1.0%
CO	14,164	0.0%	224,875	0.4%
NO_X	-904	0.0%	-6,509	-0.1%
PM2.5	-136	0.0%	-1,254	0.0%
SO_X	-1,270	0.0%	-13,377	-0.2%
1,3-Butadiene	1	0.0%	25	0.2%
Acetaldehyde	3	0.0%	57	0.1%
Acrolein	0	0.0%	2	0.0%
Benzene	-16	0.0%	-101	0.0%
Formaldehyde	-7	0.0%	-43	0.0%

Source: RIA Table 4.3-19

Consistent with the MY 2012-2016 ESA Response, EPA notes that the modeling tools available for EPA's regulatory analysis of the non-GHG pollutants are not designed to trace fluctuations in ambient concentration levels to potential impacts on particular species. EPA believes that such models do not, therefore, attribute any biological response or impact on listed species to the ambient concentration changes with the degree of reasonable certainty required under the ESA. In addition, EPA is unaware of information identifying any effects on listed species from the small fluctuations in amounts of non-GHG pollutants indicated in the chart. For the same reasons identified in the MY 2012-2016 ESA Response, EPA thus concludes that ESA

consultation is not required with respect to the non-GHG emission changes attributable to the current light duty motor vehicle rule.

For additional discussion of EPA's analysis regarding the light duty motor vehicle rule and ESA Section 7(a)(2) requirements, see the MY 2012-2016 ESA Response.

Organization: Competitive Enterprise Institute (CEI)

III. EPA/NHTSA: Denying Plain Facts They Must Know to be True

At a recent hearing before a House oversight panel, three Obama Administration witnesses — NHTSA Administrator David Strickland, EPA Assistant Air Administrator Gina McCarthy, and EPA Transportation and Air Quality Director Margo Oge – denied under oath that motor vehicle GHG emission standards are "related to" fuel economy standards.10 In so doing, they denied plain facts they must know to be true. They lied to Congress. [EPA-HQ-OAR-2010-0799-9552-A1, p. 3]

House Government Oversight and Reform Chairman Darrell Issa put it more diplomatically: "Your statements under oath misrepresented the relationship between regulating greenhouse gases and regulating fuel economy." By "obstinately insisting" that regulating greenhouse gases and fuel economy are "separate and unrelated endeavors," he said, the Administration officials "impede the Committee's important oversight work." [EPA-HQ-OAR-2010-0799-9552-A1, p. 3]

Why did they "misrepresent" and "impede"? Had they answered truthfully, they would have to admit that California's greenhouse gas motor vehicle emissions law, AB 1493, which EPA approved in June 2009,11 violates EPCA's express preemption of state laws or regulations "related to" fuel economy.12 The officials would also have to admit that EPA is effectively regulating fuel economy, a function outside the scope of its statutory authority. [EPA-HQ-OAR-2010-0799-9552-A1, p. 3]

IV. Power Grab

The falsehood that GHG emission standards are not related to fuel economy standards does more than mask EPA and CARB's poaching of NHTSA's statutory authority. It also protects EPA's efforts to legislate climate policy under the guise of implementing the CAA. [EPA-HQ-OAR-2010-0799-9552-A1, p. 3]

To begin with, the falsehood facilitated a regulatory extortion strategy enabling the Obama Administration to convert the auto industry from opponent to ally in any congressional debate on EPA's greenhouse gas regulations. [EPA-HQ-OAR-2010-0799-9552-A1, p. 3]

In February 2009, EPA Administrator Jackson decided to reconsider13 Bush EPA Administrator Stephen Johnson's denial of California's request for a waiver to implement AB 1493.14 Because GHG emissions standards implicitly regulate fuel economy, because the waiver would allow